

Internal Revenue Service

**memorandum**

CC:TL-N-8319-89

Br4:JRDomike

date: JUL 11 1989

to: District Counsel, Brooklyn NA:BRK

Attn: Laurence D. Ziegler, Assistant District Counsel

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

This responds to your memorandum dated June 5, 1989, regarding disclosure of certain items in connection with the on-going proceeding pursuant to I.R.C. § 7611. We coordinated this response with personnel of Assistant Chief Counsel (General Litigation) and (Disclosure Litigation).

CONCLUSION

This request and any response to it is not covered by the § 7611 notice requirements. The documents may be made available, but names of Service personnel should be deleted from items released.

FACTS

In connection with the on-going proceeding pursuant to section 7611 of the Internal Revenue Code (regarding church tax inquiries and examinations), the representative of the above entity has requested copies of documents regarding the Internal Revenue Service's 1975 ruling letter granting tax exemption under section 501(c)(3). You ask whether any of the following documents from that administrative file should not be submitted to the representative:

- 1) Document captioned "Memorandum Re: [REDACTED]  
[REDACTED]", dated [REDACTED];
- 2) Undated Form M-4114, Technical Case History;
- 3) Form M-3514, Publication, Environmental and File Classification Recommendations, dated July 21, 1975;
- 4) Form 3935, Exempt Organization Master File Revision Voucher, dated September 9, 1975 (2 pages);
- 5) Form 3936, Exempt Organization Master File Addition Voucher, dated July 17, 1975 (2 pages);

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- 6) Form 3778, Memorandum, dated November 26, 1973; and
- 7) Form 3778, Memorandum, dated October 1, 1973;

#### DISCUSSION

Section 7611 provides procedures for church tax inquiries and examinations. Before beginning a church tax inquiry, the Service must have a reasonable belief on the basis of facts and circumstances recorded in writing that the church may not be exempt or may be carrying on an unrelated trade or business. I.R.C. § 7611(a)(1) and (2). Then, the Service must provide notice to the church including an explanation of the concerns which gave rise to such inquiry. *Id.* § 7611(a)(1) and (3)(B)(i). The section further requires the Service to supply the church with a notice of examination which, *inter alia*, includes a copy of all documents which were collected or prepared by the Service for use in such examination and the disclosure of which is required by the Freedom of Information Act (5 U.S.C. 552). I.R.C. § 7611(b)(3)(A)(iv). The regulations under section 7611 note that disclosure under FOIA is supplemented by section 6103 of the Code (relating to disclosure and confidentiality of tax return information). Treas. Reg. § 301.7611-1, Q&A 10.

The requested documents regarding the Service's 1975 ruling did not comprise any part of the concerns which resulted in the church tax inquiry notice, nor were the documents collected or prepared for use in the church tax examination. Therefore, despite that the request was made in connection with the on-going § 7611 proceeding, the request (and any response to it) is not covered by the § 7611 notice requirements.

The representative has made an informal request for government records. However, the items which appear to be available upon formal FOIA request can be made available informally. Therefore, although no valid FOIA request has been submitted, we have considered whether the records would be disclosed upon such request and have determined that they would, with minor deletions.

The Freedom of Information Act (FOIA) provides that each agency, upon any request for records which reasonably describes such records and is made in accordance with published rules, shall make the record promptly available to any person. 5 U.S.C. § 552(a)(3). See Treas. Reg. § 301.9000-1 (procedures to be followed by officers and employees of the IRS upon receipt of a request or demand for disclosure of internal revenue records or information); also IRS, Statement of Procedural Rules §§ 601.701 and 601.702.

The FOIA exempts certain information from its disclosure requirements. These exemptions are narrowly construed, however, and the FOIA is generally interpreted in a manner favoring disclosure. Under 5 U.S.C. § 552(b) nine categories of agency records are exempt. Matters exempt from FOIA of possible relevance here are those--

--specifically exempted from disclosure by statute (other than this section 552(b)), provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld [§ 552(b)(3)];

--inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency [§ 552(b)(5)]; or

--records or information compiled for law enforcement purposes but only to the extent that the production of such ... records or information (A) could reasonably be expected to interfere with enforcement proceedings ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy ... [or] (E) would disclose techniques and procedures for law enforcement investigations ... or would disclose guidelines [therefor] if such disclosure could reasonably be expected to risk circumvention of the law ... [§ 552(b)(7)].

5 U.S.C. § 552(b)(3), (5), (7). Any reasonably segregable portion of a record must be provided after deletion of the portions which are exempt under § 552(b).

Section 6104 of the Internal Revenue Code provides for public inspection of applications for tax exemption. If an organization described in section 501(c) is exempt from taxation under section 501(a), the application filed by the organization with respect to which the Secretary made the determination that such organization was entitled to exemption, together with any papers submitted in support of such application, and any letter or other document issued by the Service with respect to such application, is open to public inspection. I.R.C. § 6104(a)(1)(A). However, what is included in "application for exemption" within the meaning of section 6104 does not include the items here. Treas. Reg. § 301.6104-1(b)(1) and (2); see also

§ 301.6104(a)-1(b) (for applications filed after October 31, 1976). Therefore, they would not be available for public inspection under section 6104.

Section 6103 of the Internal Revenue Code forbids Federal employees from making an unauthorized disclosure of returns or return information. I.R.C. § 6103(a)(1). "Return information" as defined in section 6103(b)(2)(B) includes any background file document relating to a written determination which is not open to public inspection under section 6110. While section 6103(c) permits disclosure of return information to any properly authorized designee of the taxpayer, such disclosure is not permitted if the Secretary determines that it would seriously impair Federal tax administration. See Treas. Reg. § 301.6103(c)-1(a).

We coordinated this question with the Exempt Organizations Technical Division. It is the opinion of that division, in which we concur, that of the seven documents, none need be withheld because they are administrative processing documents disclosure of which would not seriously impair federal tax administration (section 6103(c)). Therefore, 5 U.S.C. § 552(b)(3) cannot be invoked. Under the same reasoning, 5 U.S.C. § 552(b)(7)(A) and (E) cannot be invoked, that is, the production of these items cannot in our view reasonably be expected to interfere with enforcement proceedings or disclose techniques or procedures for law enforcement investigations and risk circumvention of the law.

One item, "Memorandum Re: [REDACTED]," reflects advice secured from the Commissioners's attorney; however, we conclude that it is not exempt from disclosure under 5 U.S.C. § 552(b)(5) as an intra-agency memorandum which would not be available to a litigant in discovery. The protected classes of such memorandums are attorney work products, confidential communications between client and attorney, and governmental (i.e. pre-decisional) deliberative material. This memorandum only contains facts about the organization secured from its representative by the attorney and relayed to the Commissioner.

Thus, the remaining concern we have is for release of the names of Service personnel. The FOIA exempts the production of records or information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C). Pursuant to the last sentence of

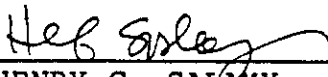
§ 552(b), this information (names of personnel) can be withheld by deletion. Should the organization desire to pursue the deleted information, it may initiate FOIA procedures under 5 U.S.C. § 552 and related regulations.

We suggest use of a covering letter to make clear the basis on which we are providing the documents, which says, "While these documents are not covered by the § 7611 notice requirements, and they are not being provided in response to any Freedom of Information Act request, we are making them available to you at your request, with certain names redacted."

If we can be of further assistance, please advise.

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By:

  
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